

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

THE ESTATE OF JOLENE LOVELETT  
("LOVELETT"),

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.

Defendants.

**NO. C16-5922 BHS**

**PLAINTIFF'S MOTION FOR FRCP 60  
RELIEF/CLARIFICATION OF  
COURT'S ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS, DECLINING  
SUPPLEMENTAL JURISDICTION,  
AND DISMISSING REMAINING  
CLAIMS WITHOUT PREJUDICE**

**Noted on Motion Calendar:  
February 22, 2019**

**I. RELIEF REQUESTED**

Plaintiff The Estate of Jolene Lovelett ("the Estate") respectfully moves this Court for relief under Fed.R.Civ.P. 60(a) to clarify an issue that has just arisen in Washington State Superior Court<sup>1</sup> regarding this Court's July 26, 2018 "Order Granting Defendant's Motion to Dismiss, Declining Supplemental Jurisdiction, and Dismissing Remaining Claims Without Prejudice" (Dkt. 175, "7-26-18 Order") and Judgment (Dkt. 176). The need for relief is based on defendant Florence Fadele's recent argument in her Washington Civil Rule 12(b)(6) Motion to Dismiss in Washington State Superior Court, where Ms. Fadele asserted that this Court dismissed state claims against her with prejudice, such that res judicata applies to preclude the

<sup>1</sup> Following this Court's dismissal of this federal action in July 2018, the Estate filed state claims in Washington State Superior Court, now pending in Thurston County Superior Court, Case No. 18-2-05787-34.

1 Estate from bringing those claims in State Court.<sup>2</sup> Fadele's interpretation of this Court's Order  
2 does not reflect this Court's intent in the 7-26-18 Order and the Judgment. Rather, this Court  
3 dismissed state claims against non-Government employees such as Ms. Fadele without  
4 prejudice, leaving those claims for the State Court to address.

5 Ms. Fadele's misinterpretation is partly based on the absence of the qualifying word  
6 "Government" before "Defendants" in the following bolded phrase concluding the Order:

7 [I]t is hereby ORDERED that the Government's motion to dismiss (Dkt. 172) is  
8 GRANTED, the Estate's VAS<sup>3</sup> claims **against Defendants** are DISMISSED with  
9 prejudice, and the Estate's remaining state law claims are DISMISSED without  
prejudice.

10 Morrow Decl., Exhibit 1 (Dkt. 175) (emphasis added).<sup>4</sup> The Estate has always understood the  
11 Order to dismiss the remaining state claims against Ms. Fadele and other non-Government  
12 defendants without prejudice and that there was no need for clarification or correction of any  
13 clerical error, mistake, or oversight. "Government" is in the immediately preceding sentence;  
14 the Order reflects that the "motion to dismiss (Dkt. 172)" is by the Government, not including  
15 Ms. Fadele; "Defendants" is defined on page 1 of the Order as Dufraigne, Hoyle, Moen, and  
16 Shipp; and the Order's title and language are clear. Nevertheless, the misunderstanding in State  
17 Court requires this Motion.

18 As this Court carefully explained in its Order, the word "Defendants" in the second  
19 sentence refers to those for whom the United States substituted as defendant, and on behalf of  
20 whom the United States moved to dismiss claims made under the Federal Tort Claims Act  
21 ("FTCA"). These Defendants are clearly listed in the definition of Defendants on page 1 of the  
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23 <sup>2</sup> Fadele's Motion and the Estate's Response are exhibits attached to the Declaration of Jane Morrow. No  
24 other defendant in the State Court action joined that motion. All other defendants in the State Court action, like  
25 Ms. Fadele, were not federal tribal employees for whom the United States substituted and moved to dismiss under  
26 the Federal Tort Claims Act ("FTCA").

<sup>3</sup> Washington State Vulnerable Adult Statute, RCW Chapter 74.34.

<sup>4</sup> "Dkt. 172" is "Defendant United States' Renewed Motion To Dismiss Personal Injury Claims." Ms.  
Fadele was not involved in that motion because she was not a federal tribal employee; she did not and could not  
request dismissal with prejudice under the FTCA.

1 Order (Dufraine, Hoyle, Moen, and Shipp). Ms. Fadele is not and never was one of those  
2 Government Defendants, and this Court did not intend to dismiss state claims against her with  
3 prejudice.

4 However, at a State Court hearing on Ms. Fadele's Motion to Dismiss on January 25,  
5 2019, the State Court accepted Fadele's argument and granted her motion to dismiss state  
6 claims against her with prejudice. The State Court allowed the Estate 60 days (until March 26,  
7 2019) to move this Court for clarification whether it had dismissed state claims against Fadele  
8 with or without prejudice. Morrow Declaration, Ex. 4.

9 Accordingly, under Fed.R.Civ.P. 60(a), the Estate respectfully asks the Court to amend  
10 its 7-26-18 Order (Dkt. 175) and Judgment (Dkt. 176), with the following underlined  
11 clarifications of the Court's intent:

- 12 • Order, p. 1, line 21 ff., after "Dkt. 1.": "The complaint pleaded allegations against other  
13 defendants, but they are not substituted-for by the Government, and did not join this  
14 motion by the Government. As ordered below and in the title of this Order, remaining  
15 state claims against those other defendants are dismissed without prejudice."
- 16 • Order, p. 4, line 21 ff.: *See, e.g.*, Dkt 1, ¶11 ("All acts and omissions of defendant Moen  
17 were done under color of federal and state law and under the authority of her position  
18 as an agent/employee/subcontractor with the Chehalis Tribal Wellness Center.")
- 19 • Order, p. 7, line 3 ff. (amendments underlined):

20 Therefore, it is hereby **ORDERED** that the Government's motion to dismiss (Dkt. 172)  
21 is **GRANTED**, the Estate's VAS claims against the Government Defendants—Nancy  
22 Dufraine, Heather Hoyle, Kelsie Moen, RN, and Trisha Shipp, LPN—are DISMISSED  
23 with prejudice, and the Estate's remaining state law claims against all other  
24 defendants—Abbott Adult Family Homes LLC, Florence Fadele, ARNP, Kristy  
25 Danforth, RN, Sandra Sanders, Renna/Reena Rizal, and Bhakta Rizal—are  
26 **DISMISSED without prejudice**. The Clerk shall enter a **JUDGMENT** and close the case.

Plaintiff requests that the Judgment be revised to similarly reflect this Court's intent as follows:

1 The Court has ORDERED that, the Government's motion to dismiss is granted.  
2 Plaintiff's VAS claims against the Government Defendants are **DISMISSED with**  
3 **prejudice**, and the remaining state law claims against all other defendants—Abbott  
4 Adult Family Homes LLC, Florence Fadele, ARNP, Kristy Danforth, RN, Sandra  
5 Sanders, Renna/Reena Rizal, and Bhakta Rizal—are DISMISSED without  
6 **prejudice. JUDGMENT** is entered in favor of the Government Defendants—  
7 Nancy Dufraine, Heather Hoyle, Kelsie Moen, RN, and Trisha Shipp, LPN.

8 The Estate's proposed Amended Order and proposed Amended Judgment add the  
9 requested clarifying language.

## 10 II. RELEVANT FACTS

11 Following this Court's July 26, 2018 dismissal of this federal action in the above Order  
12 (Dkt. 175) and entry of Judgment (Dkt. 176), the Estate filed state claims in Washington State  
13 Superior Court, now pending in Thurston County Superior Court, Case No. 18-2-05787-34.  
14 Defendant Florence Fadele, ARNP, who was a defendant in the federal action but not a federal  
15 tribal employee,<sup>5</sup> moved in State Court to dismiss the Estate's claims against her. Her principal  
16 argument was that this Court had already dismissed the Washington State Vulnerable Adult  
17 Statute ("VAS") claims against her with prejudice in this Court's 7-26-18 Order, by the above-  
18 quoted language on page 7. Morrow Decl., Exhibit 3 (Fadele Motion to Dismiss).

19 The procedural history is set forth in the Court's Order, and summarized here:

- 20 • Nov. 1, 2016: The Estate filed its complaint alleging claims under 42 U.S.C. § 1983 and  
21 independent state claims including those under the Washington VAS, RCW Chapter 74.34.  
22 Dkt. 1.
- 23 • March 3, 2017: The United States appeared and substituted itself for the Government  
24 (federal tribal employee) defendants (Hoyle, Shipp, Moen, and Dufraine). Dkt. 39.<sup>6</sup>

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25 <sup>5</sup> Fadele was hired to work at the tribal clinic through an independent agency and was represented  
26 separately from the federal defendants. *See, e.g.*, Dkt. 43; Dkt. 154.

<sup>6</sup> As this Court stated in its Order, federal law provides that the FTCA is the sole means of recovery  
against federal employees for their negligent or wrongful acts or omissions while acting within the scope of their  
employment. The FTCA thus waives sovereign immunity to allow certain tort suits against the United States for  
such acts by federal employees. 28 U.S.C. §§ 2675, 2679(b)(1), 1346(b); Dkt. 175, at 3-4. The United States must  
certify that the employee was acting within the scope of his or her employment at the time of the event giving rise

- 1 • March 8, 2017: The United States then moved to dismiss claims against itself and the  
2 Government defendants for whom it had substituted under the FTCA. Dkt. 40.<sup>7</sup>
- 3 • May 1, 2017: This Court granted the United States' motion to dismiss on the grounds that  
4 the Estate "failed to provide a sum certain for personal injury damages," meaning that the  
5 Estate had failed to exhaust administrative remedies as would be necessary in order to bring  
6 common law claims against the federal tribal employees. Dkt. 54, at 3.
- 7 • June 11, 2018: This Court dismissed the federal constitutional claims under 42 U.S.C. §  
8 1983. Dkt. 162. Since it appeared that all federal claims had been dismissed, the Court  
9 requested briefing on whether it should retain supplemental jurisdiction over the state claims  
10 (including the VAS). **The Court specifically declared that the Estate's "state law claims**  
11 **involve novel interpretations of Washington's Abuse of Vulnerable Adults Act and the**  
12 **implementing regulations. ... Therefore, the Court is considering declining to exercise**  
13 **supplemental jurisdiction over the remaining claims and dismiss them without**  
14 **prejudice."** *Id.* at 10-11 (emphasis added).
- 15 • June 19, 2018: This Court requested briefing to answer the question why the United States,  
16 when substituting for the Government (federal tribal) defendants, had not included the VAS  
17 allegations as common law claims covered by the FTCA, subject to dismissal. Dkt. 169.  
18 The United States then filed an amended notice of substitution adding the VAS claims to  
19 its substitution, Dkt. 171, along with a renewed motion to dismiss, Dkt. 172.<sup>8</sup>

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22 to the action. 28 U.S.C. § 2679(d)(1). Upon that certification, the action is deemed to be against the United States  
23 under the FTCA, and the United States is substituted as the defendant. In the federal case brought by Ms. Lovelett's  
24 Estate, the United States Attorney General certified that the federal tribal defendants were acting within the scope  
25 of their employment, and the United States therefore substituted itself for them "solely" for common law tort  
26 allegations under the FTCA. Dkt. 39 (March 3, 2017).

<sup>7</sup> The United States never substituted for Fadele or represented her, since she was not a Government  
(federal tribal) employee. Fadele did not participate in the United States' motion to dismiss. Dkt. 40.

<sup>8</sup> After limited jurisdictional discovery to determine whether the Tribe had waived sovereign (tribal)  
immunity, the Estate agreed to dismiss the Tribe, and this Court entered an order of dismissal on May 14, 2018.  
Dkt. 152.

- 1 • July 26, 2018: This Court granted the United States' motion to dismiss claims against the  
2 Government defendants for whom it had substituted for purposes of the FTCA:

3 [I]t is hereby ORDERED that the Government's motion to dismiss (Dkt. 172) is  
4 GRANTED, the Estate's VAS claims against Defendants are DISMISSED with  
5 prejudice, and the Estate's remaining state law claims are DISMISSED without  
6 prejudice.

Dkt. 175.<sup>9</sup>

7 The title of the Order identifies the United States as the only party moving for dismissal:  
8 "Order Granting Defendant's Motion to Dismiss, Declining Supplemental Jurisdiction, and  
9 Dismissing Remaining Claims Without Prejudice." Dkt. 175, at 1 (emphasis added). The body  
10 of the Order notes the motion to dismiss is by Defendant United States of America  
11 ("Government"), which had substituted itself for the federal tribal defendants – not including  
12 Fadele – that is, Hoyle, Shipp, Dufraine, Moen. The Order concludes by noting that the Court  
13 had dismissed all the Estate's federal claims which had given the Court original jurisdiction,  
14 and "**The Estate's remaining claims involve complex and novel issues of state law that are**  
15 **best left to the state courts.**" *Id.* at 6 (emphasis added).

16 This Court then declined to exercise supplemental jurisdiction and dismissed all state  
17 law claims against Fadele (and other non-Government defendants) **without** prejudice. This  
18 Court clearly intended that the VAS claims against the non-governmental defendants would be  
19 best resolved by the State Court with its experience and body of state caselaw on the statute.  
20 However, Fadele's argument raised questions for the State Court, requiring this Motion.

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24 <sup>9</sup> Similarly, the Judgment (July 27, 2018) states:

25 The Court has ORDERED that, the Government's motion to dismiss is granted. Plaintiffs  
26 VAS claims against Defendants are DISMISSED with prejudice, and the remaining state law claims  
are DISMISSED without prejudice. JUDGMENT is entered in favor of Defendants.

Dkt. 176.

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### III. ISSUE

Should this Court clarify that it intended to and did dismiss supplemental state claims, specifically including the Washington State Vulnerable Adult Statute claims, against Fadele (and other non-Government defendants) without prejudice, and amend its Order and Judgment accordingly?

### IV. AUTHORITY AND ARGUMENT

Fed.R.Civ.P. 60(a) provides: “Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice.”<sup>10</sup>

The Estate has always understood the 7-26-18 Federal Court Order to dismiss all supplemental state claims against defendant Fadele and the other state defendants without prejudice. No other state defendant joined Fadele’s motion. The Estate believed there was no need for clarification from this Court until the conclusion of the hearing in Thurston County Superior Court on January 25, 2019. At that time, the State Court allowed the Estate 60 days (until March 26, 2019), to seek clarification from this Court, and the Estate has now requested that relief.

“Rule 60(a) allows for clarification and explanation, consistent with the intent of the original judgment, even in the absence of ambiguity, if necessary for enforcement.” *Garamendi v. Henin*, 683 F.3d 1069, 1079-80 (9<sup>th</sup> Cir. 2012). The Rule “allows a court to clarify a judgment in order to correct a failure to memorialize part of its decision, to reflect the necessary implications of the original order, to ensure that the court's purpose is fully implemented, or to

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<sup>10</sup> See also Fed.R.Civ.P. 60(b)(1) (listing “mistake, inadvertence, surprise” as grounds for relief from a final judgment or order).

1 permit enforcement.” *Tattersalls, Ltd. v. DeHaven*, 745 F.3d 1294, 1298 (9th Cir. 2014)  
2 (quoting *Garamendi*, at 1079; internal quotation marks omitted).

3 The “touchstone” of Rule 60(a) is “fidelity to the intent behind the original judgment.”  
4 *Garamendi*, at 1078. In deciding these motions, the Ninth Circuit “focuses on what the court  
5 *originally intended to do.*” *Tattersalls*, at 1297 (quotation omitted; emphasis in original).

6 The Rule thus covers more than the quintessential “clerical” errors (for example, where  
7 the court errs in transcribing the judgment or makes a computational mistake). In *Tattersalls*,  
8 the Ninth Circuit affirmed the district court’s use of Rule 60(a) to correct the judgment to award  
9 monetary damages, even though the 28-day time limit in Rule 59(e) had passed. In *Garamendi*,  
10 the Ninth Circuit allowed the district court to use Rule 60(a) to clarify a judgment that could  
11 not be domesticated in a foreign country because its reasoning was not sufficiently detailed. *In*  
12 *re Jee*, 799 F.2d 532 (9th Cir.1986), held that a court could use Rule 60(a) to amend a prior  
13 dismissal order “where the record and the recollection of the judge who entered the order  
14 indicated that the dismissal was intended to be without prejudice.” *Tattersalls*, at 1297-98. *See*  
15 *also Jones & Guerrero Co. v. Sealift Pacific*, 650 F.2d 1072 (9th Cir.1981) (district court  
16 properly used Rule 60(a) to correct a blanket order dismissing 22 diversity cases, where the  
17 court intended to remand one to territorial court); *Robi v. Five Platters, Inc.*, 918 F.2d 1439,  
18 1444-46 (9<sup>th</sup> Cir. 1990) (court could use Rule 60(a) to clarify that it intended to cancel three  
19 trademarks, not just the one explicitly mentioned in the judgment).

20 Clarifying and amending the 7-26-18 Order and Judgment is precisely the type of relief  
21 needed in this situation. That Order sets out this Court’s intent to allow the State Court to  
22 address the Estate’s remaining state claims, including those under the VAS, against non-  
23 Government defendants including Fadele. Dismissal of those claims without prejudice is a  
24 “necessary implication[] of the original order,” and clarifying this Court’s intent will “ensure  
25 that the court’s purpose is fully implemented” as well as “permit enforcement.” *Garamendi*, at  
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1 1079; *Tattersalls*, at 1297–98. Granting the relief requested in this Motion will also give  
2 “fidelity to the intent behind the original judgment.” *Garamendi*, at 1078.

### 3 V. CONCLUSION

4 This Court declined to exercise supplemental jurisdiction over the Estate’s state claims  
5 against Fadele and the other non-Federal Government employees. The Court dismissed the  
6 remaining state claims, including those under the VAS, against Fadele without prejudice.  
7 Accordingly, the Estate asks the Court to amend its Order and Judgment, with the following  
8 underlined clarifications of the Court’s intent:

- 9
- 10 • Order, p. 1, line 21 ff., after “Dkt. 1.”: “The complaint pleaded allegations against other  
11 defendants, but they are not substituted-for by the Government, and did not join this  
12 motion by the Government. As ordered below and in the title of this Order, remaining  
13 state claims against those other defendants are dismissed without prejudice.”
  - 14 • Order, p. 4, line 21 ff.: “*See, e.g., Dkt 1, ¶11* (“All acts and omissions of defendant  
15 Moen were done under color of federal and state law and under the authority of her  
16 position as an agent/employee/subcontractor with the Chehalis Tribal Wellness  
17 Center.”)”
  - 18 • Order, p. 7, line 3 ff.:

19 Therefore, it is hereby **ORDERED** that the Government’s motion to dismiss (Dkt. 172)  
20 is **GRANTED**, the Estate’s VAS claims against the Government Defendants—Nancy  
21 Dufraigne, Heather Hoyle, Kelsie Moen, RN, and Trisha Shipp, LPN—are DISMISSED  
22 with prejudice, and the Estate’s remaining state law claims against all other defendants,  
23 including defendants Abbott Adult Family Homes LLC, Florence Fadele, ARNP, Kristy  
24 Danforth, RN, Sandra Sanders, Renna/Reena Rizal, and Bhakta Rizal, are DISMISSED  
25 without prejudice. The Clerk shall enter a **JUDGMENT** and close the case.

26 The Judgment should be revised as follows:

27 The Court has **ORDERED** that, the Government’s motion to dismiss is granted.  
28 Plaintiff’s VAS claims against the Government Defendants are DISMISSED with  
29 prejudice, and the remaining state law claims against all other defendants, including  
30 defendants Abbott Adult Family Homes LLC, Florence Fadele, ARNP, Kristy Danforth,  
31 RN, Sandra Sanders, Renna/Reena Rizal, and Bhakta Rizal, are DISMISSED without

1        **prejudice. JUDGMENT** is entered in favor of the Government Defendants—Nancy  
2        Dufraine, Heather Hoyle, Kelsie Moen, RN, and Trisha Shipp, LPN.

3        The Estate's proposed Amended Order and proposed Amended Judgment add the  
4        requested clarifying language.

5        DATE: February 7, 2019.

Otorowski Morrow & Golden, PLLC

7        By: S/ Jane Morrow

Jane Morrow, WSBA # 22533

8        Heather S. Moore Paradis, WSBA #27711

9        Attorneys for Plaintiff

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

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